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Issue Date: 20 January 2004

In the Matter of

Northwest Community Action Programs
of Wyoming, Inc.,
Claimant

Case No.: 2003WIA00005

v.

United States Department of Labor and
Grant Officer Lorraine H. Saunders,
Respondents

DECISION AND ORDER

This case arises under the provisions of the Workforce Investment Act, 29 U.S.C. § 2911 et seq. (WIA or Act) and the regulations contained at 20 C.F.R. § 660 et. seq. The WIA provides funding for job training and employment programs for migrant farm workers under the National Farm Workers Jobs Program (NFWJP). Parties interested in receiving such grants apply directly to the Department of Labor, pursuant to Solicitations for Grant Applications (SGAs) published in the Federal Register. Grants are made to specified geographic areas, and the recipient oversees the program in those areas. The grants under this program are formula grants, with an amount appropriated by Congress proportionately allocated by the United States Department of Labor among designated state service areas. The competition for these grants is by individual state service area. Parties which unsuccessfully apply for grants may request review of the grant officer's decisions by the Office of Administrative Law Judges. 20 C.F.R. § 667.800.

This appeal concerns the competition for the Wyoming State service area for the program year 2003, for which $224,568 was appropriated.[1] The Complainant, Northwest Community Action Programs of Wyoming, Inc. (NOWCAP), the incumbent, was the only applicant for the state of Wyoming for the 2003 program year. NOWCAP was not selected, and it appealed this determination to the Office of Administrative Law Judges. I held a formal hearing in Washington, D.C. on October 28 and 29, 2003.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

[1] Despite the fact that the statute contemplates grants for two years, the SGA indicated that the grant was for one year. Respondents have stipulated that grant awards under the SGA cover a two year period, program years 2003 and 2004, contingent on the availability of Congressional funding for program year 2004.

[2] Citations to the record are as follows: "Tr." for the transcript of the hearing; "CX" for Complainant's Exhibits; "EX" for Respondent's Exhibits; and "ALJ" for Administrative Law Judge Exhibits.

The standard set forth under the regulations requires that I determine, not whether the Grant Officer's decision was correct, but whether there is a basis in the record to support the Grant Officer's decision. 20 C.F.R. Section 667.825(a). This is a high threshold to overcome, and requires a finding that the Grant Officer's determination was not reasonable, was arbitrary or capricious, or an abuse of discretion, or was not in accordance with the law. Nevertheless, as discussed below, I find that the Grant Officer's determination not to award the grant for the state of Wyoming to NOWCAP was in fact not reasonable, was arbitrary and capricious and an abuse of discretion, and was not in accordance with the law, and thus there is not a basis in the record to support the Grant Officer's decision not to award the grant in question to NOWCAP.

Background

At the appropriate time for soliciting grantees for a NFWJP grant, the Department of Labor publishes an SGA in the Federal Register, which provides the deadlines and criteria by which interested organizations can apply for the grants. To do so, interested organizations submit an application, following the guidelines in the solicitation.

The applications are reviewed by a panel of technical experts, who individually review each application against the criteria listed in the SGA, compile strengths and weaknesses, and assign scores. These scores are then tabulated and averaged, and the results provided to the Grant Officer. The Grant Officer reviews the panel's recommendation, as well as the applications. Additionally, as provided by the SGA, the Grant Officer requests a pre-award clearance on the applicants, referred to as a "responsibility review," to ensure that there are no problems with fraud, debt collection problems, or disallowed costs on audit, on the part of any applicants. The Grant Officer is not bound to follow the recommendation of the review panel.

In this case, the SGA was published in the Federal Register on April 17, 2003, inviting interested parties to submit an application for grants for the 2003 program years, and including instructions for doing so (CX 12). The SGA also set out five criteria that would be considered in selecting the grantee, as well as the points that would be assigned to each factor. Although the grants were to be awarded nationwide, the competition was by individual state service areas, with a few exceptions (Tr. 49).

In the state service area of Wyoming, NOWCAP, which was the incumbent grantee in the Wyoming service area for more than 26 years, was the only applicant to submit an application under the SGA (Tr. 48, 71). NOWCAP had administered the migrant state farm worker programs under the CETA, JTPA, and WIA programs since 1977, without current programmatic or audit problems (CX 2 at 52; Tr. 71). According to Ms. Saunders, the Grant Officer responsible for the final decision on selection of the grantees in all of the service areas nationwide, NOWCAP's application was timely, responsive, complete, and complied with all regulatory procedures (CX 2 at 48; Tr. 94). NOWCAP's panel rating score was 58.[3]

[3] As discussed below, the panel rating score is suspect, and the rating sheets themselves were the focus of questionable activity by Respondent and counsel.

However, NOWCAP was not selected as the grantee for the 2003 program year. I have reviewed Ms. Saunders' sworn testimony at her deposition and at the hearing, as well as her sworn answers to discovery, and I find that it is contradictory and lacking in credibility, and does not support her determination not to award a grant to NOWCAP. I also find that her determination was arbitrary and capricious, and not in accordance with the law.

Once the applications under the SGA were received, they were submitted for a panel review. Ms. Serena Boyd, who was the Grants Management Specialist in this competition, met with the panel members to discuss their responsibilities, the due date for their ratings, and the fact that they would meet to deliberate and review their scores (Tr. 148, 292). She provided the members an overview of the SGA, a conflict of interest form, and panel instructions (Tr. 293). She collected the individual panel rating sheets after the panel deliberation, and provided them to Ms. Saunders.

The Respondent did not include the individual panel rating sheets in the administrative file, and refused to produce them in discovery, relying on the deliberative process privilege. Pursuant to my Order of September 26, 2003, the Respondent was required to produce the individual panel rating sheets, with the names of the panelists redacted. Ms. Boyd testified that Mr. Frank Buckley, counsel for Respondent, asked her to search for the original panel score sheets, and she subsequently provided him with copies of them (Tr. 267). She then received a phone message from Mr. Peter Nessen, also counsel for Respondent, asking her to "redact" the rating sheets (Tr. 267, 303). She could not recall the specifics of this message, but understood only that she was supposed to make the sheets "clear."[4] On one set of panel rating sheets, the original numbers had been scratched out, and different numbers written down, resulting in the total score being changed from 82 to 59. In order to make this sheet "neat," Ms. Boyd cut out a section of a blank panel rating sheet, placed it over the scratched out rating sheet, and used a copy machine to create a new blank copy. She then wrote in the numbers on this copy, and provided it to counsel; she testified that she did not change any of the numbers. Ms. Boyd testified that she then threw out the cut and pasted sheet from which she had made her copy (Tr. 267 – 286; CX 1).

After the panel review process was completed, Ms. Saunders compiled a list of grant applicants nationwide, listed in order by panel score, from high to low (CX 6, dated June 17, 2003). Ms. Saunders made a notation indicating that the seven applicants with panel scores below 80 were not awarded grants. According to Ms. Saunders, the applicants on this list were sent for responsibility review on June 20, 2003 (CX 2 at 76).

At her deposition, Ms. Saunders testified that she attended two meetings with persons from the Program Office, where the list of applicants was reviewed. The first meeting took place in late June, and was attended by Lance Grubb, Laura Cesario, John Beverly, Alina Walker, and Ross Shearer.[5] The second meeting was held in the first week of July, and was attended by Mr. Beverly, Mr. Grubb, Ms. Cesario, and James DeLuca. At that meeting, the attendees reviewed the list of grantees, as well as NOWCAP's proposal. (CX 2 at 27-28).

[4] Ms. Boyd understood that Mr. Nessen did not have copies of the original panel rating sheets.
[5] Mr. Shearer testified at the hearing that he never attended a meeting where the applications or awards were discussed (Tr. 218).

The SGA requires that the Grant Officer submit the names of grant applicants to the Special Program Services Unit for a "responsibility review." The purpose of this review, which results in a written report, is to allow the Special Programs Services Unit to review the available records to assess the organization's overall responsibility to administer federal funds. This review is independent of the competitive process, and is not dependent on an applicant's panel score (Tr. 60). Before making her determinations in this particular grant application, on about June 20, Ms. Saunders directed Ms. Boyd to submit the names of all of the applicants nationwide to the Special Programs Services Unit for a responsibility review. However, NOWCAP's name was not included in this request (Tr. 65; CX 14). At her deposition on August 8, 2003, Ms. Saunders testified that she did not submit NOWCAP's name for a responsibility review because of its low panel score of 58, which made it unlikely that she would make an award to NOWCAP. She testified that they were taken off the list for responsibility review based solely on their panel score (CX 2 at 78).

In fact, on the list of applicants, there are three other applicants with scores less than 58, including an applicant with a score of 2. At the hearing, Ms. Saunders revised her testimony, stating that NOWCAP's name was inadvertently left off the list submitted for responsibility review, and placing the blame for its omission on Ms. Boyd (Tr. 56, 58).

Ms. Boyd, who was responsible for actually submitting the names for responsibility review at Ms. Saunders' request, testified that NOWCAP was inadvertently left off of the original request for pre-award clearance (Tr. 256). Although she could not recall how she learned that she had not done the responsibility review, she did recall that counsel told her it had not been done (Tr. 263). Once she found out, in October 2003, she requested a review, even though there was no pending award process for which she needed such a review of NOWCAP (Tr. 256). According to Ms. Saunders, this was done because it was "proper," especially since NOWCAP's counsel was making an issue of it (Tr. 62).

I do not find either Ms. Saunders' or Ms. Boyd's testimony on this point to be credible. Ms. Saunders explanations for the omission of NOWCAP are directly contradictory. As counsel for the Complainant pointed out, Ms. Boyd prepared the grant application packages for NOWCAP, Black Hills Special Services Cooperative (Black Hills), and Washington State Migrant Council (WSMC), who had appealed their non-selection, in August 2003. The grant application packages for Black Hills and WSMC contained the results of a responsibility review, but NOWCAP's package did not, and thus it would have been obvious to Ms. Boyd at that time that there was no responsibility review for NOWCAP. The evidence suggests that in fact the responsibility review was done at the request of Mr. Frank Buckley, counsel for the Respondent, in early October 2003 (CX 29). It is difficult to understand why this was done, because there was no program for which NOWCAP was applying at the time.

In any event, Ms. Saunders made her selections on June 30, 2003, and the successful applicants were notified on July 1, the first day of the program year. The Director of NOWCAP, Mr. Erik Stolns, spoke by telephone with Amanda Denogan on June 30, and learned that NOWCAP had not received an award (Tr. 248). NOWCAP filed its appeal with the Office of Administrative Law Judges on July 9, 2003, along with a request for an expedited hearing. Four

other applicants who had learned that they had not received grants – Kern County, Tennessee Opportunity Programs, Inc. (TOPS), Black Hills, and WSMC – also filed appeals and requests for expedited hearing. In a telephone conference with Chief Judge Vittone on July 14, 2003, counsel for Respondent represented that NOWCAP's appeal, as well as the appeal in the four other matters, was premature, as the final determination letters had not yet been issued by the Grant Officer. Based on that representation, Judge Vittone deferred the request for expedited proceedings.[6] In fact, however, Ms. Saunders had made her determinations on July 1, 2003, and written agreements had been signed with competitors of Black Hills and WSMC on July 1 (Tr. 113).

On August 7, 2003, the Respondents offered the Governor of Wyoming the right of first refusal to operate a WIA grant in Wyoming (CX 30). The letter from Emily Stover DeRocco, Assistant Secretary for Employment and Training, to the Honorable Dave Freudenthal, Governor of Wyoming, states that NOWCAP was not awarded the grant because its application received a rating below the minimum required. The Governor declined this offer, and has supported NOWCAP in its appeal (CX 26).

At her deposition on August 8, 2003, Ms. Saunders testified that she received verbal advice from employees of the Program Office that there had been problems with NOWCAP's performance, but she testified categorically that she did not receive or rely on any written documents from the Program Office in making her determination not to award a grant to NOWCAP (CX 2 at 32-33, 200). However, in her sworn answers to NOWCAP's first set of document requests and interrogatories prepared on August 13, 2003, Ms. Saunders produced an undated memorandum from Ross Shearer, Jr., a staff member in the Division of Seasonal Farm Worker Programs, and identified it as a document that she "used" while making her final decision with respect to NOWCAP (CX 19). This memorandum was not included in the administrative file produced pursuant to Judge Vittone's July 30 Order. Ms. Saunders also stated that there was a draft of this document, which she declined to produce on the grounds that it was protected by the deliberative process privilege. In her response, Ms. Saunders also produced the list of applicants to which she referred in her deposition, which was also not included in the administrative file.[7]

On September 23, 2003, NOWCAP, Black Hills, and WSMC filed a motion to compel production of the individual panel rating sheets, and the draft of the Shearer memorandum identified by Ms. Saunders in her response to discovery, but withheld on the grounds of the deliberative process privilege. In response to this motion, the Respondent represented that Ms. Saunders "used" the memorandum in making her determination, but that she did not see the draft, and thus this draft was not relevant, and in any event was protected by the deliberative process privilege. The Respondent also argued that the panel rating sheets were protected by the deliberative process privilege. On September 26, 2003, I issued my Order granting the

[6] After conducting a telephone conference call on July 24, 2003, Judge Vittone issued an Order establishing a discovery schedule. The three remaining matters were subsequently assigned to me, and on August 29, 2003, I issued a Notification of Hearing and Pre-Hearing Order.

[7] At the hearing, Ms. Saunders changed her testimony again, stating that she did not rely on Mr. Shearer's memorandum, because such information was not provided on any other grantees (Tr. 96). Of course, this begs the question as to why she requested the memorandum in the first place.

Complainant's motion in part, and ordering the Respondent to provide the individual panel rating sheets, with the names of the panel members redacted.

On October 7, 2003, Ms. DeRocco again wrote to the Governor of Wyoming, stating that the only application for the NFJP grant was received from NOWCAP, whose "application received a rating below the minimum required to be considered responsive to the Solicitation for Grant Applications (SGA) (CX 30)." Ms. DeRocco stated that, "because no awardable application was received to provide services in Wyoming," the Governor had been offered the opportunity to operate the program. Ms. DeRocco notified the Governor that, since the fifteen day period for response had expired, ETA had offered the grant to Motivation, Education, and Training, Inc. (MET). The Respondent provided NOWCAP with a copy of this letter only after a brief status conference with the Court on October 10, where NOWCAP learned for the first time that the grant had been offered to another organization.

On October 8, 2003, the Respondents produced an e-mail cover sheet reflecting that Mr. Shearer sent his memorandum to Ms. Saunders by e-mail on July 18, 2003 (coincidentally, the date on which Ms. Saunders' deposition was originally scheduled) (CX 8). At the hearing, Mr. Shearer testified that he was asked by his supervisors, Alina Walker and John Beverly, to provide information about NOWCAP's performance that was in the file to the Grant Officer, to help her to make her decision (Tr. 216-217). He further testified that he was asked to prepare this memorandum either the evening of July 16 or the morning of July 17, as a rush project, and that he never met or spoke with Ms. Saunders to discuss NOWCAP's performance. Although Mr. Shearer delivered both the memorandum and the cover e-mail to counsel at the same time, when they were requested in discovery by NOWCAP, only the undated memorandum was produced or identified by counsel in response to NOWCAP's discovery requests.

On October 15, 2003, Ms. Alina Walker, Chief of the Division of Seasonal Farmworker Programs, offered the grant to Motivation, Education, and Training, Inc. (METS), again noting that NOWCAP was not awarded the grant because its application had not met the minimum required to be considered responsive to the SGA (CX 31).

On October 22, 2003, counsel for the Respondent provided NOWCAP with the responsibility review he had received from Ms. Boyd on October 9, 2003 (CX 29). On October 27, 2003, the day before the hearing, counsel for the Respondent filed a Motion to Quash a subpoena served on Ms. DeRocco, on the grounds that her testimony would be irrelevant and not helpful, and because she had no personal knowledge of the issues being litigated, and thus was not a competent witness.[8] In its response opposing the motion to quash, the Claimant noted that Ms. DeRocco was timely listed as a trial witness in the Complainant's prehearing exchange that was filed on October 9, 2003, and that counsel for the Respondent did not notify the Complainant that Ms. DeRocco would not voluntary appear at the hearing until October 17, 2003. I conducted a telephone conference with the parties, and advised counsel for the Respondent that they had not provided sufficient grounds to quash the subpoena. At that time, counsel for the Respondent indicated that Ms. DeRocco was scheduled to be out of town on the date of the hearing. Ms. DeRocco did not appear at the hearing, and counsel for the Respondent

[8] The Respondent also sought to quash a subpoena served on Mr. Nessen, counsel for the Respondent; the Claimant subsequently withdrew the subpoena.

again stated that she was out of town, although he could not offer any details about when she might be available to testify. Counsel for Respondent did not offer any affidavit or statement from Ms. DeRocco confirming her unavailability to testify at the hearing. He did, however, offer into evidence an affidavit by Ms. DeRocco, disavowing the language in her October 7, 2003 letter to Governor Freudenthal, as well as a letter to Governor Freudenthal, "correcting" her earlier statements.

Counsel for the Respondent also offered an affidavit by Ms. Walker, who wrote the letter offering the grant to METS, as well as a letter "correcting" her earlier statements. I did not admit either the affidavits or the letters into the file

DISCUSSION

As discussed below, I find that the evidence is clear and convincing that there were numerous serious flaws in Ms. Saunders' decisionmaking process, which were exacerbated and compounded by Ms. Saunders' and counsel's numerous attempts to obfuscate and mislead the Complainant and this Court. The evidence as a whole leads me to conclude that there was not a basis for Ms. Saunders' decision not to award the grant to NOWCAP.

Use of a Minimum Cutoff Panel Rating Score

The SGA requires that the competition for grants under this program be conducted on a state by state basis. The use of a minimum cutoff score, however, effectively converts the process to a nationwide competition, by comparing scores of applicants in one service area with scores of applicants in another service area. At her deposition, Ms. Saunders testified that the entire group of applications was competed as a group against each other (CX 2 at 124). She also testified that the list of applicants was sent for responsibility review on June 20, 2003, but that NOWCAP was not on that list (CX 2 at 76).

Q: So why is NOWCAP not on the list [of applicants submitted for responsibility review]?
A: I'm not sure. It – well, NOWCAP as I said before received a score of 58, and in my experience it's not likely that we would award to NOWCAP – to an applicant that scored 58. it needed reconsideration, so at this time it was not on the list.
Q: So based solely on the score 58 they were taken off the list of potential awardees?
A: That's correct.

(CX 2 at 78).

Viewing the evidence as a whole, including the testimony at trial and the exhibits, I find that it supports by clear and convincing evidence the Complainant's contention that Ms. Saunders used a panel score cutoff of 80 as the basis for her disqualification of NOWCAP. Having received the panel rating sheets for all of the applicants, Ms. Saunders ranked them from highest to lowest, and decided to award grants to all applicants with a score of 80 or higher. Although Ms. Saunders characterized this as a "preliminary" determination, and suggested that she was not finished with her decisionmaking process, in fact the only applicants with scores

below 80 who were subsequently awarded grants were Kern County and TOPS, which appealed their non-selection to the Office of Administrative Law Judges. I do not accept Ms. Saunders' explanation that it "just happened" that these appeals were made before she finished making her decisions.[9]

In any event, notifications were made and contracts were signed with the successful applicants on July 1, 2003 (Tr. 121 – 128). NOWCAP, along with four other unsuccessful applicants, learned of their non-selection, and filed an appeal, with a request for expedited hearing. I find that it is reasonable to infer that, at that time, realizing that she would have to prepare an administrative file to support her determination, Ms. Saunders requested written information from the Program Office on NOWCAP's past performance to bolster and document her determination. For whatever reason, however, the memorandum prepared by Mr. Shearer at Ms. Saunders' request was not included in the administrative file, and at her deposition on August 8, 2003, Ms. Saunders categorically denied that she considered or reviewed any documents other than the SGA, the panel rating sheets, the application, and the list of applicants she compiled, when she made her final decision not to award a grant to NOWCAP (CX 2 at 33).

However, in her answers to discovery posed by NOWCAP, Ms. Saunders for the first time identified Mr. Shearer's memorandum, as well as a draft thereof, as documents she "used" in making her final decision not to fund NOWCAP. It appears that it was Mr. Shearer who actually provided counsel with the memorandum, which was undated, as well as the e-mail cover sheet, which was dated. Yet counsel chose to provide NOWCAP only with the undated memorandum, thus reinforcing the suggestion that Ms. Saunders had this information, which was not favorable to NOWCAP, when she made her determination not to fund NOWCAP.

After Respondent provided this cover sheet to NOWCAP, on October 8, 2003, it became clear that Mr. Shearer was not asked to prepare his memorandum until some time after Ms. Saunders made her determination, and after NOWCAP had filed its appeal. At the hearing, Ms. Saunders disavowed her sworn answers to discovery, and testified that she did not in fact rely on Mr. Shearer's memorandum in making her determination. Clearly, the existence of this memorandum put Ms. Saunders in a difficult position: if she in fact relied on the information in the memorandum, she was required to include it in the administrative file. I find that this memorandum was generated by Ms. Saunders after the fact, in an attempt to establish that she had a reasonable and documented basis for her non-selection of NOWCAP.

I find that Ms. Saunders did in fact employ a cutoff score of 80 in making her determination not to award a grant to NOWCAP. This in itself it is sufficient grounds to overturn Ms. Saunders' determination. As the Complainant correctly points out, there is nothing in the SGA or in the WIA regulations that establishes a panel score of 80, or any other number, as the basis for the disqualification of an applicant. Ms. Saunders' testimony in this regard is contradictory and not persuasive. Although she testified at her deposition that she based her

[9] At her deposition, Ms. Saunders testified that she did not include the County of Kern and TOPS in the initial group of awards, because she was not ready to make a decision, and she wanted to take another look at the applications. She testified that her decision not to include these applicants in her "initial" group of awards was based solely on their panel scores (CX 2 at 38; Tr. 110).

"initial" decision to make awards on a panel score cutoff, at the hearing, she testified that she did not use a cutoff score at all in making the award determinations.

But the fact that a panel rating cutoff was used was confirmed by the letters from Ms. Walker and Ms. Larocca, whose statements are unambiguous that NOWCAP did not receive the grant because it did not receive the required minimum panel rating score. Counsel for Respondent argues in his brief that these statements are simply erroneous. Respondent had the opportunity to call both Ms. Walker and Ms. Larocca as witnesses at the hearing. But Respondent declined to produce them.[10] As there is no evidence in the record to suggest otherwise, I find that the letters written by Ms. Walker and Ms. Larocca support the claim that there was a minimum panel rating score required for a successful grant applicant, a requirement that improperly converts the process into a nationwide competition.

Panel Rating Sheets

Ms. Saunders' relied on the panel rating sheets, in the face of obvious disagreements among the panel, at least in their initial reviews of NOWCAP's application. It did not concern Ms. Saunders that there were scratchouts on one of these review sheets, and she made no efforts to determine if there was a problem with this particular rating, where the final score had been changed from 82, which was a score that met her "initial" cutoff, to 58 (Tr. 158). Counsel for the Respondent refused to identify the panel members, relying on the deliberative process privilege. As a result, there is no testimony or evidence in the record as to how or why these changes were made. [11] Thus, there is no basis for a determination that the changes were the innocent result of the deliberative process, or a deliberate attempt to skew the results against NOWCAP. There is no factual basis on which I can make a determination that Ms. Saunders' reliance on these obviously altered rating sheets was reasonable.

Input from the Program Office

Ms. Saunders made it clear, both at her deposition and at the hearing, that she also relied on verbal information from the Program Office in making her determination (CX 2 at 84; Tr. 52-53). At her deposition, she testified that there were two meetings with Program Office staff where NOWCAP's application was discussed. She described the information that she received as "negative feedback," and a reluctance to work with NOWCAP, because of problems with their performance and reporting. Counsel for the Respondent would not allow Ms. Saunders to identify precisely what was said or by whom at these meetings, asserting the deliberative process privilege. Because no details were offered by the Respondent regarding the information provided to Ms. Saunders by the Program Office, it is not possible to assess the nature of that information. The fact that Ms. Saunders requested written documentation from the Program Office after NOWCAP filed its appeal, however, suggests that Ms. Saunders was sufficiently

[10] Instead, counsel offered into evidence sworn statements by Ms. Walker and Ms. Larocca, which I did not admit into the record.

[11] Counsel for the Respondent repeatedly attempted to question Ms. Boyd about what happened during the panel deliberations, but I sustained the objections by the Complainant, on the ground that the Respondent would not produce the names of the panel members so that the Complainant could examine them.

uncomfortable with her determination to attempt to document it with something in writing from the Program Office.

The Complainant argues that the Grant Officer, by relying on verbal information from the Program Office, improperly conducted a "special" responsibility review, rather than the responsibility review process provided by the SGA. I find that this contention has merit. The Respondent argues that the Grant Officer was correct to seek and rely on the information provided by the Program Office, noting that there is no legal authority for the Complainant's contention. But in fact, this issue has arisen before, most notably in *In the Matter of Commonwealth of Puerto Rico, Department of Labor and Human Resources v. Alexis Herman, Secretary of the U.S. Department of Labor, and Rural Opportunities, Inc.,* 97 JTP 24. In that case, the complainant filed a motion to compel the disclosure of the names of the members of a second review panel, and to produce scoring sheets and other documents from the members of the first and second review panel. Administrative Law Judge Thomas Burke granted the Complainant's motion, and ordered the information disclosed.

In his decision, Judge Burke noted that Director Anna Goddard, who was without Grant Officer authority, had become involved in the procurement process and proffered the opinion that the complainant should not be selected. Mr. Bryan Keilty, who was at the time the Administrator of the Office of Financial and Administrative Management, testified that this involvement was inappropriate, and that the Program Office should not be involved in decisions of the Grant Officer. Mr. Keilty testified that the purpose of this was "to insure that the Grant Officer's decision is the Grant Officer's decision, that the Grant Officer may not be bullied by or intimidated by or have undue pressure by people outside of the procurement process. It is to keep it clean."

Judge Burke considered this information in determining that the complainant presented sufficient support for its allegations of arbitrariness in the selection process to allow for his determination that the complainant's allegations were not frivolous, and that the complainant had raised sufficient questions regarding the propriety of the selection process to compel a finding that the process should not be shielded by the deliberative process privilege.

Here, it is undisputed that Ms. Saunders relied on information she received from the Program Office. Unlike the situation before Judge Burke, however, we do not know precisely what any particular Program Office employee said to Ms. Saunders in connection with the NOWCAP application, because counsel refused to allow her to answer questions on this issue, citing the deliberative process privilege. As the Complainant pointed out in its motion to compel, there is no evidence in the record that counsel had the authority to assert this privilege, or that an agency head or high level official specifically designated to act in his or her stead asserted the privilege after personally reviewing the information sought. Indeed, Ms. Saunders' testimony establishes that counsel, and no one at the agency itself, elected to assert the deliberative process privilege, when no one at the agency itself had made a request to withhold this evidence. I find that the decision to withhold this information in this manner supports the inference that it reflected unfavorably on the Respondent.[12]

[12] Nor do I have any confidence that there are not additional documents or e-mails that have not been produced or identified by the Respondent.

Ms. Saunders attempted to suggest that she made her determination first, i.e., that she reviewed NOWCAP's application, and felt that it was poorly written, and she then contacted her upline grant officers and the Program Office to see if the award could be conditionally granted (Tr. 70). In fact, I find that the sequence of events suggests the opposite – that sometime before June 20, 2003, when she submitted her list of applicants for responsibility review, Ms. Saunders received information from the Program Office that they did not wish to work with NOWCAP. This is the only reasonable explanation as to why NOWCAP was not included in the list of applicants submitted for responsibility review – Ms. Saunders took them off based on, or at the request of, the Program Office.

I find that Ms. Saunders improperly relied on verbal information she received from the Program Office, which should not have been involved in the procurement process. That counsel refused to allow her to provide details regarding the information she received bolsters my conclusion that this involvement was improper, and resulted in a process that was not "clean." As the Complainant contends, NOWCAP *was* treated differently than the other applicants.[13]

Sanctions Against the Respondent

NOWCAP has requested that the Respondent be assessed for NOWCAP's attorneys' fees and costs in pursuing its appeal. NOWCAP has also requested that these costs be assessed against Respondent's counsel in their personal capacities. The statutes and regulations governing these particular proceedings do not include a provision for the assessment of attorney fees, or for sanctions against a party. Title 29 C.F.R. Section 18.3 provides that the Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by the rules, or by any statute, executive order, or regulation.

Rule 11, Rules of Civil Procedure, provides for sanctions against attorneys or parties who make false, misleading, unsupported, or improper representations to the Court. The Rule provides that on its own initiative, the Court may enter an order describing the specific conduct that appears to violate the Rule, and directing the attorneys or parties to show cause why they have not violated the Rule. The sanction provided for violation of Rule 11 is limited to that which is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and may consist of nonmonetary directives, an order to pay a penalty, or an order directing payment of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

The Respondent has been represented in this proceeding by Stephen Jones, Frank Buckley, and Peter Nessen, attorneys with the Solicitor's Office of the Department of Labor. Viewing this matter as it progressed from July 2003 through the present, I find that their actions reflect, at best, a cavalier attitude toward their obligations as officers of the Court and advocates for an agency of the United States.

[13] At the hearing, Ms. Saunders disavowed any reliance on Mr. Shearer's memorandum because that would not have been fair, since information from the Program Office had not been sought on the other applicants. She did not explain why it was appropriate to rely on similar information from the Program Office that was not in writing.

The first instance in which counsel was less than forthcoming with the Court concerned the appeals filed by NOWCAP and the four other organizations who had learned they had not received a grant for the 2003 program year. Because the grants are of limited duration, it is imperative that resolution of an appeal be made quickly, or the issue will be moot with the expiration of the grant. Thus, these parties filed notices of appeal as soon as they learned of their non-selection, and asked for expedited hearings. At that time, the appeals were docketed before Chief Judge John Vittone, who scheduled a conference call with the parties for July 14. During this conversation, as reflected by Judge Vittone's July 16 Order, Mr. Jones represented that the appeals were "premature," as no determination letters had yet been sent on the grants. But in fact, Ms. Saunders had made her determinations as of July 1, and in two of the cases, contracts with the successful applicants had been signed on July 1.

In its brief, the Respondent argues that Ms. Saunders' determinations were made on July 23, 2003, the date of the letter to NOWCAP advising them of their non-selection. But this is simply not consistent with the evidence as a whole. The evidence suggests that Ms. Saunders made that decision much earlier than July 23, 2003, however, and in no event later than July 1, the first day of the new grant year, and the date that the successful applicants were notified.

It is clear that as of July 1, 2003, Ms. Saunders had determined that NOWCAP was not going to be awarded a grant. By that time, she had submitted the names of the potential grantees to the Special Program Services Office for a responsibility review; NOWCAP's name was not on that list. I do not accept Ms. Saunders' later and revised explanation that NOWCAP was inadvertently left off the list by Ms. Boyd, nor do I accept Ms. Boyd's testimony that it was inadvertently left off, and she only discovered this omission in October 2003.

Ms. Saunders testified at her deposition in August 2003 that NOWCAP's name was not submitted for a responsibility review on June 20, 2003 because its low score of 58 made it unlikely that they would receive a grant. Yet Ms. Saunders submitted all of the other applicants' names, including one whose score was 2. Logically, there had to be another reason that Ms. Saunders did not submit NOWCAP for responsibility review. The only other information available to Ms. Saunders was the verbal information that she stated she received from the Program Office. It is reasonable to infer that at the time she requested the responsibility review, Ms. Saunders had already determined that she would not award a grant to NOWCAP, based not only on its low score, but also on whatever information she received from the Program Office. That she left NOWCAP's name off the list, and only NOWCAP's name, strongly suggests that she had already made her decision not to award it a grant.

Judge Vittone's July 16, 2003 Order makes it clear that he was under the impression that no determination had been made with respect to NOWCAP's application, as well as the four others, and on that basis he deferred consideration of the request for expedited processing. The practical effect of this was to run the clock down on the grant period. I find that counsel's statements to Judge Vittone, while technically accurate, in that the formal letters of non-selection had not yet been sent, had the effect of misleading Judge Vittone, a situation that counsel took no steps to correct.

Equally disturbing is counsel's response to NOWCAP's discovery requests. Counsel must have known that July 1, 2003 was the operative date for purposes of the decision not to award a grant to NOWCAP. Although Mr. Shearer provided counsel with his undated memorandum, as well as the e-mail cover page that bore the date of July 18, 2003, counsel provided only the undated memorandum in discovery, presenting it as a document that Ms. Saunders used in making her final determination not to fund NOWCAP.[14] Counsel did not identify the existence of the cover page in any fashion, either on a privilege log or otherwise. The effect of presenting the memorandum in this manner, and I believe the purpose, was to reinforce the impression that Ms. Saunders had a rational and reasonable basis for her decision.

It was only after NOWCAP filed a motion to compel, which I granted, that it became clear that Mr. Shearer's memorandum was created after the fact, to document a decision that had already been made. Notably, no explanation has been offered by counsel for their failure to turn over the cover sheet to Mr. Shearer's memorandum, other than to claim, contrary to any reasonable interpretation of the record, that Ms. Saunders' decision was made on July 23, 2003.

Finally, there is the matter of the doctored panel rating sheets. I do not find it to be improper that counsel initially withheld the panel rating sheets on the grounds of privilege. But I find that Mr. Nessen and Mr. Buckley acted, if not in bad faith, at least with gross negligence in response to my Order to produce redacted copies of those rating sheets. Based on Ms. Boyd's testimony, I believe that what happened was that Ms. Boyd provided a copy of the original, unredacted rating sheets to Mr. Buckley. She then received a call from Mr. Nessen, telling her only to "redact" these rating sheets, and she proceeded to create the phony rating sheet. Mr. Nessen apparently forwarded this rating sheet to NOWCAP, without comparing it with the original copy. When it was discovered shortly thereafter what had happened, counsel forwarded a copy of the original, with only the names redacted.

I find it incomprehensible that a person in Ms. Boyd's position would consider it to be appropriate to alter official documents in the manner she testified to. However, the blame for this fiasco cannot be laid solely on Ms. Boyd. It was the responsibility of Mr. Buckley and Mr. Nessen to ensure that the panel rating sheets produced pursuant to my Order were correctly redacted. It is difficult to understand why Mr. Buckley, having a copy of the original rating sheet in his possession, did not redact it himself. Alternatively, either he or Mr. Nessen should have given explicit and detailed instructions to Ms. Boyd on how to perform the redaction. But at a minimum, counsel was obligated to examine the redacted version prepared by Ms. Boyd, and to compare it to the original, to ensure that the redaction was properly done. Counsel's failure to do so resulted in the expenditure of significant resources by opposing counsel and the Court in attempting to get to the bottom of the matter.[15]

I find that the Complainant's request for sanctions is well-grounded, and I will order the Respondent and counsel to show cause as to why they should not be required to pay to the

[14] By providing this memorandum to the Complainant after Ms. Saunders' deposition, counsel effectively prevented the Complainant from questioning her about it before the hearing.

[15] Nor do I find it to be particularly commendable that an attorney for an agency of the federal government would deliberately ignore a subpoena for the appearance of a witness.

Complainant an amount representing attorneys' fees and other expenses expended as a result of Respondent's conduct as described above.[16]

SUMMARY AND CONCLUSION

The requirements in the SGA are straightforward. The Grant Officer is required to consider all of the information available to her in making her determinations in a grant solicitation. Here, Ms. Saunders had available to her the Complainant's application, the panel rating sheets (which were problematical), the responsibility review process, and more than 26 years of institutional information regarding NOWCAP's history of operating federal grants[17]. But rather than following the process provided in the SGA, Ms. Saunders removed NOWCAP's application from consideration on the basis of verbal information from the Program Office that the Respondent has hidden behind the veil of the deliberative process privilege. Worse still, she attempted to document her decision with a written memorandum created after the fact, strongly suggesting that she was aware that she did not have a legitimate basis for her decision. Counsel further compounded the situation by improperly withholding the cover sheet that dated this memorandum.[18]

While the regulations require that I make my determination about the reasonableness of the Grant Officer's determination based on the information she had available to her at the time she made that determination, that does not mean that subsequent events are completely irrelevant in making these findings. For instance, the fact that Ms. Saunders requested the creation of Mr. Shearer's memorandum after she had made her determination not to fund NOWCAP strongly suggests that she recognized that her determination was not supportable, and that she needed something in writing to back it up. It is not clear why she did not identify this memorandum at her deposition, despite pointed questioning, but Ms. Saunders knew that it was not included in the administrative file.

Of course, Mr. Shearer provided his memorandum and the cover page to counsel, and it was reasonable to assume at that point that the memorandum would come to light. The fact that counsel improperly withheld the cover page that dated the memorandum strongly suggests that counsel intended to foster the impression that this memorandum was available to Ms. Saunders before she made her determination, and knew that to turn it over would reveal the fact that it was a justification created after the fact. Once counsel was required by my Order to turn this cover sheet over, counsel then took the position that Ms. Saunders' determination was not made until July 23, 2003.

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[16]

[17] Although Ms. Saunders testified at the deposition and at the hearing that she relied on her independent review of NOWCAP's application, which was poorly written, she offered only vague descriptions of the deficiencies in the application, testifying that it "parroted" the SGA, and did not contain enough detail (CX 3 at 25). Furthermore, she testified that she first reviewed NOWCAP's application in late July, which I find was well after she made her determination not to fund NOWCAP (Tr. 165-166). I do not accept that Ms. Saunders independently assessed the application as deficient, rather than simply relying on the flawed panel assessment.

[18] I find that it is not determinative that NOWCAP was not notified of its appeal rights, as required by the SGA. Ms. Saunders testified that her supervisor, Laura Cesario, directed her to use a notification letter that did not contain the required notification of appeal rights. I do, however, find this to be another example of the Respondent's cavalier disregard of the requirements of the procurement process.

In other words, I find that the actions of Ms. Saunders and of counsel throughout this process were deliberately calculated to obfuscate, mislead, and delay, and are persuasive evidence of the awareness on the part of Ms. Saunders and counsel that the selection process was seriously and fatally flawed. The Respondent has the obligation to provide each applicant an unbiased opportunity to compete for the grant. NOWCAP did not receive that opportunity.

The regulations provide that in an appeal of an unfavorable grant determination, the Grant Officer has the burden of production to support her decision, and the party seeking to overturn that decision has the burden of persuasion. 20 C.F.R. Section 667.810(e). I find that the Grant Officer has not met her burden, in that she has not produced evidence to support a finding that she had a reasonable basis for her decision not to fund NOWCAP. I also find that the Complainant has met its burden of persuasion, and has established by clear and convincing evidence that Ms. Saunders did not have a reasonable basis for her decision not to award a grant to NOWCAP. Accordingly, I find that NOWCAP should have been selected as the grantee for the program year 2003.

ORDER

Accordingly, IT IS HEREBY ORDERED:

A. The Respondent shall determine whether NOWCAP continues to meet the requirements of 20 C.F.R Part 668 or 669, and if so, the Respondent shall fund NOWCAP for the remainder of program year 2003, and program year 2004, contingent on the availability of Congressional Funding for program year 2004.

B. The Respondent shall show cause, within fifteen days of the date of this Order, as to why Respondent and counsel should not be assessed with the reasonable attorneys' fees and expenses expended by NOWCAP in prosecuting its claim.

C. The Complainant shall have ten days after service of the Respondent's response to the order to show cause to file any reply with the Court.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge